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No. 839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI

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Now comes petitioner, by its counsel, and respectfully asks that its petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, which was denied May 16, 1960, be reheard and reconsidered pursuant to Rule 58 on the basis of substantial grounds available to petitioner not previously presented.

I. The Court of Appeals Was Clearly and Understandably, But Mistakenly, Biased and Prejudiced Against Petitioner on the Second Appeal

With respect to reserves for depreciation, depletion and bad debts respondent's brief on the second appeal, at page 35, stated to the Court of Appeals as follows:

> "On this ultimate issue the taxpayer's fire is centered on the court's 'astonishing mistake' of overlooking the * * * reserves for depreciation, depletion, and bad debts. (Br. 3.) It argues that these should be taken into account and presents elaborate tables to show how subtraction of these amounts from 'Total Assets' would produce a deficit. (Br. 20-21.)
>
> "Insofar as depreciation, depletion, and bad debts are concerned, the taxpayer is simply, demonstrably, and obviously wrong. In the balance sheets (Appendix B, *infra*), the amount given for 'Total Assets' is computed only *after* the deduction of a reserve for notes and accounts receivable, a reserve for loans secured and insecured, a reserve for depreciation, and a reserve for depletion ('Dredging rights'). It is only the *net* amounts which are included in total a[illegible] Taxpayer in its table on pages 20-21 of its brief takes *this* figure of total assets and then deducts the same amounts a second time." (Respondent's italics)

Petitioner **did not** make a "subtraction" of reserves from total assets *at all* and **did not** deduct reserves a "second time". However, because of the above unfortunate misstatements to the contrary in respondent's brief, the Court of Appeals considered and decided this case on the second appeal with the *mistaken* firm conviction that petitioner had misstated the facts *when no such thing had occurred.* In the second opinion the Court of Appeals stated (App. 33a):

"* * * The taxpayer is thus totally incorrect when it claims additional reserves for bad debts, because the bad debt expense has already been eliminated from surplus; moreover, only the *net* receivables were considered by the court in evaluating the taxpayer's assets which are available for dividends.

"For the same reasons, the taxpayer's argument concerning the reserves for *depreciation and depletion* cannot be accepted. Surplus has already been reduced by annual charges to depreciation expense and to depletion expense; allowing them again would give the taxpayer double deductions. * * *" (Court's italics)

By petition for rehearing before the Court of Appeals (Vol. III, pp. 1-8 and 26-28) *petitioner conclusively demonstrated, both factually and by affidavit of a Certified Public Accountant, that it had not deducted "the same amounts a second time" for depreciation, depletion and bad debts, as stated in respondent's brief, and had not claimed "double deductions" for depreciation, depletion and bad debts as held by the Court of Appeals.* In other words, instead of being "totally incorrect", as stated by the Court of Appeals, petitioner's statement of the facts as to depreciation, depletion and bad debts *was 100% accurate.* However, *the harm had been done.* The Court of Appeals understandably was incensed because of its *mistaken* belief that petitioner had sought to mislead with respect to depreciation, depletion and bad debts.

There was no misstatement in petitioner's brief. Nevertheless, the Court of Appeals' unfortunate misconception that petitioner had misstated facts as to depreciation, depletion and bad debts was reflected in its opinion, *to petitioner's irretrievable detriment.*

It should be noted that *the "double deduction" theory*, on which the Court of Appeals refused to allow any accumulation of earnings to replace admittedly exhausted assets, is so *completely without foundation in fact or law* that respondent's opposition brief before this Court, unlike his brief below, did not mention, or make any attempt to defend or justify, the "double deduction" theory *on which the Court of Appeals was misled into erroneously deciding against petitioner on the crucial ultimate issue as to whether petitioner had accumulated earnings beyond the reasonable needs of its business.*

II. The Background of This Case Is Such That the Court of Appeals' Understandable, Though Groundless, Bias and Prejudice on the Second Appeal Was Clearly Fatal to Petitioner Because of the Court's Mistaken Belief on the First Appeal That Petitioner Had Not Presented Its Case With Integrity and Fairness

On the first appeal petitioner had no inkling as to the reason for the Court of Appeals' obvious hostility during the oral argument. It was not until the Court's first opinion was rendered that petitioner learned, through footnote 4, that the Court had passed upon the first appeal under the mistaken belief that petitioner's presentation was lacking in accuracy and integrity.

In footnote 4 the first opinion (App. 6a) made it clear that the case had been considered and decided by the Court of Appeals under the *misapprehension* (1) that petitioner had relied upon figures before the Court overstating the position taken before the Tax Court and (2) that "petitioner's brief and appendix abound in such discrepancies."

Petitioner conclusively demonstrated to the Court of Appeals that its case had been honestly presented with

meticulous accuracy and the Court deleted its wholly erroneous footnote 4 from the first opinion (App. 20a). There also, however, *the harm had been done* to petitioner's irretrievable detriment.

It is respectfully submitted that, in the light of the foregoing facts, the petition for a writ of certiorari should be granted to the end that petitioner may have the unbiased and unprejudiced appellate review to which it is entitled.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be reheard and granted.

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I, David R. Shelton, counsel for petitioner, do hereby certify that the foregoing petition for a rehearing in this case is presented in good faith and not for delay and that such petition for a rehearing is restricted to the substantial grounds above stated which were available to the petitioner although not previously presented.

DAVID R. SHELTON

June, 1960.